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In The
# Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, AND
PROTECT MARRIAGE WASHINGTON,

*Petitioners,*

v.

SAM REED, SECRETARY OF STATE OF WASHINGTON; AND BRENDA GALARZA, IN HER OFFICIAL CAPACITY AS PUBLIC RECORDS OFFICER FOR THE SECRETARY OF STATE OF WASHINGTON, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF RESPONDENT WASHINGTON COALITION FOR OPEN GOVERNMENT

LESLIE R. WEATHERHEAD
*Counsel of Record*
DUANE M. SWINTON
STEVEN J. DIXSON
WITHERSPOON KELLEY
422 W. Riverside Ave.,
Suite 1100
Spokane, WA 99201
lrw@witherspoonkelley.com
(509) 624-5265

*Counsel for Respondent Washington Coalition for Open Government*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## INTRODUCTION

The Washington Coalition for Open Government ("WCOG") is an independent, non-partisan, non-profit organization that is a successor to the coalition of public interest groups formed in the late 1960s to advocate for open government in the State of Washington. The statute challenged here, Washington's Public Records Act, was drafted by that coalition, which in 1972 successfully advocated for its adoption by the people of the State of Washington by initiative.

WCOG's mission statement states that the organization is "dedicated to promoting and defending the people's right to know in matters of public interest and in the conduct of the public's business. The Coalition's driving vision is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy."

WCOG, having issued a request under the Public Records Act to the Washington's Secretary of State for access to the referendum petitions at issue here, intervened in the action below. WCOG's public records request in this case was initiated by its Chairman, Toby Nixon, a former two-term Republican state representative. Its other board members include representatives of the media, the Association of Washington Business, labor unions, the Association of Realtors and the Washington Newspaper Publishers Association, local county officials, the current Democrat majority leader of the Washington State House of

Representatives, university professors, the Washington State Auditor, private attorneys and private citizens. WCOG's advocacy for open government has included filing numerous amicus briefs before Washington state appellate courts on issues relating to open public records, open public meetings, and access to court records.

## SUMMARY OF ARGUMENT

Petitioners are a political action group and two unidentified Washington citizens who exercised their right of direct popular legislation under the Washington constitution to require a referendum on an enactment of Washington's legislature. They did so by signing a petition directing Washington's Secretary of State to submit a proposed law to the people of Washington for a referendum vote to revoke a statute previously enacted by the State. This method of direct popular legislation is prescribed in Article 2, Section 1 of the Washington constitution. After the fact, they sought to shroud their exercise of this direct popular legislative power in secrecy, in contravention of Washington law providing that their legislative action is a matter of public record, asserting that the United States Constitution overrides Washington law providing for transparent, open government. However, nothing in the federal Constitution compels Washington to permit Petitioners to operate the state legislative process in secrecy. There is no right, fundamental or otherwise, to secrecy in the legislative process.

No part of the United States Constitution provides for direct popular legislation, and the drafters of the First Amendment expressly decided not to include such a right, or the protection of such a right, within the First Amendment. Further, the federal Constitution generally requires transparency in the legislative process, unless a specific need for secrecy is recognized by the legislature.

Transparency in government is a core political value in the State of Washington. So is the right of direct popular legislation. The drafters of Washington's state constitution were free to balance these values as they did; Washington's constitution and Public Records Act do not facially violate any federal constitutional principle or command.

Petitioners seek sweeping relief. They seek to have this Court declare unconstitutional, as facially in violation of the First Amendment, Washington's requirement under the State's Public Records Act that petitions directing that a ballot measure be put before the voters are public records, requiring instead that they be secreted from the public's view, contradicting Washington state law which dictates that the petitions are public records. The secrecy ban that Petitioners advocate is not based on a factual determination in this case that potential harm would result to the referendum signers. Rather, the injunction issued by the District Court was premised on a facial challenge to Washington's Public Records Act. Petitioners seek a per se ban forbidding Washington (or any other state that extends its citizens the right

of direct popular legislation) from granting public access to the names of citizens who have engaged in the process of direct popular legislation.

The concept of secret operation of the popular legislative power that Petitioners urge is not supported by the decisions of this Court finding some Constitutional protection for anonymous speech only in the context of pure advocacy and interactive political speech. No decision of this Court has established or even hinted that the legislative process in this country ought to proceed in secrecy. Petitioners' far-reaching request fails for several reasons:

First, under the Washington constitution, individual voters who sign a referendum petition thereby act as "citizen legislators." By their signatures, they do one thing only: they direct the Washington Secretary of State to put a measure on a ballot for a vote of the people. The act of signing a petition is identical to the act of a legislator, proposing legislation to the full legislature for vote. Such action is not pure advocacy or hortatory speech of the kind that this Court has held is covered by a federal Constitutional right to proceed in secrecy. Directing the Secretary of State to put a referendum on the ballot, although an act accomplished by a medium of communication, is not simply the exercise of free speech; rather it is a legislative act sanctioned by the Washington constitution under specific conditions, one of which is that the citizen must affix his or her name to a petition calling for the vote. Signing the petition is thus not merely the advocacy of a position; it is a substantial

legislative act mandating that a specific proposition be put before the citizens of Washington for a vote.

Second, no provision of the Constitution requires States to operate any part of their legislative machinery in secret. The federal Constitution does not provide for a direct popular legislative power. The framers of the First Amendment expressly debated, and rejected, a clause in the First Amendment that would protect a direct popular legislative right. Petitioners cannot, therefore, locate a right to anonymous direct popular legislative power in the First Amendment. Nor does the Constitution provide for a right to legislate in secret. The federal Constitution's default rule is for legislative activity to occur in public. This Court, and Washington's Supreme Court, have upheld laws governing lobbyists against Constitutional challenge based on an asserted right to petition anonymously.

Third, the decisions of this Court on which Petitioners rely do not establish the right Petitioners claim. The cases hold only that citizens engaging in core political speech that is interactive in nature, such as pamphleteering, have a right under the First Amendment to speak anonymously. Such speech is not implicated in this case, where Petitioners challenge Washington's Public Records Act but have not challenged the state constitutional requirement that they identify themselves as petitioners by their signatures, having instead recognized that there is a valid state interest in requiring individuals to list

their names and addresses on referendum petitions at a minimum to prevent fraud.

Fourth, transparency in government is a core political value in the state of Washington, as a corollary to the principle that the people of the state are sovereign, control government, and empower government officials. Emphasizing this principle, in 1972 the citizens of the State adopted the Public Records Act by initiative. It is conceded in this case that the Public Records Act mandates that the referendum petitions signed by Petitioners be made available for public review and inspection. Though state law includes numerous exemptions from the Public Records Act, there are no exemptions applicable to referendum petitions.

The right to operate the legislative machinery in secret that Petitioners seek to establish in this case would traduce the principles of transparency, accountability of government and public officials, and due regard for the right of a sovereign citizenry to be fully informed that underlie the Washington constitution, as adopted in 1889 and amended in 1912, and the State's Public Records Act, adopted by initiative in 1972. The Public Records Act has been an important part of Washington's political system for 38 years, and no part of it has ever been declared unconstitutional by either a state or federal court (other than the District Court in this case).

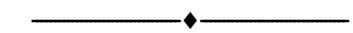
Fifth, this Court has recognized that the federal Constitution affords states considerable latitude in

managing their electoral and legislative processes. Washington was free to decide how to balance the desiderata of transparency in government and access to a power of direct popular legislation, so long as it did so without offending federal Constitutional rights that (unlike the First Amendment) may apply. The provisions of Washington's constitution governing the right of direct popular legislation, including the provisions requiring the submission of signatures to be maintained as public records, not only do not offend the First Amendment, they also do not violate any other provision of the federal Constitution. They comport with the federal Constitution, and accomplish important and legitimate public objectives.

Sixth, the harm that Petitioners seek to avoid, harassment by fellow citizens who disagree vehemently with the Petitioners' legislative goals, is neither authorized nor fostered *sub rosa* by Washington law. Petitioners make no attempt to explain why every citizen legislator who injects himself into public political fora by sponsoring new laws (or, as in this case, by sponsoring review of legislature-made laws) should be completely exempt from all public scrutiny, criticism and debate to which other public actors are typically subject in a robust democracy. Petitioners' claim is limited to the assertion of an entitlement to be free from "uncomfortable conversations" in connection with the petition they actually signed, and more broadly (citing examples from other legislative efforts in other states) to be free from vile, frightening or alarmingly confrontational speech of

third parties that may intimidate them. But the harm they allege is a consequence of the wrongful actions of third parties, most of whom (ironically) may abuse their right of anonymous speech by conduct that is expressly forbidden by the law of Washington, which neither promotes nor tolerates harassment of any kind.

Seventh, the case reaches this Court on review of the district court's judgment honoring Petitioners' facial challenge to the application of the state Public Records Act to referendum petitions. Petitioners have not shown that there is no set of circumstances in which the ordinary operation of Washington law might not offend the Constitutional protections whose existence they seek to establish. History (the power of direct popular legislation in Washington has existed substantially in its present form for nearly 100 years, and petitions invoking the power have been public records for 38 years, and there has never previously been a case comparable to that brought by Petitioners) suggests that the circumstances alleged and theories advanced by Petitioners are exceptional, and not that there is a basis for declaring Washington law facially invalid, even were this Court to consider that the federal Constitution is somehow implicated in the circumstances of the instant case.



## ARGUMENT

### A. The Power Of Initiative And Referendum Are Legislative Powers

#### 1. The State Constitution Provides that the Power of Initiative and Referendum Are Legislative Powers

##### a. Legislative power was originally vested exclusively in the legislature.

When the Washington State Constitution was adopted in 1889, its drafters provided that legislative power would be reposed in a bicameral legislature on the federal model:

> **Legislative Powers, Where Vested.** The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the State of Washington.

WASH. CONST. art. II, § 1.

##### b. In 1912 the Washington constitution was amended to empower citizens to directly sponsor legislation by directing its placement on the ballot.

In 1912, the Seventh Amendment to Washington's constitution redefined the legislative power expressly to include a right in the people to legislate directly:

> **Legislative Powers, Where Vested.** The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject or propose any act, item, section or part of any bill, act or law passed by the legislature.

Article 2, Section 1 provides that the legislative power reserved to the people includes the power of initiative and referendum. The manner of compelling a vote on a proposed initiative or referendum was prescribed in the amendment. A specified number of "voters shall be required to propose any [initiative] measure by petition" and, likewise, a specified number of voters "shall be required to sign and make a valid referendum petition." The amendment provides that the petitions be submitted to the Secretary of State, who plays a purely ministerial role in validating that the requisite number of eligible voters have signed, and then putting the measure(s) on the ballot. The legislative power evidenced in the initiative and referendum process is so significant that "the veto power of the governor shall not extend to measures initiated by or referred to the people." WASH. CONST. art. II, § 1(d). In sum, citizens executing referendum petitions are taking on the mantle of citizen

legislators in sponsoring legislation to be voted on by the people of the State.

Direct popular legislation is important in the State of Washington. It is typical, in an election year, that two or three referendums or initiatives are placed before the voters for approval. Since 1972, there have been 1,114 initiative petitions filed, of which 87 were validated and put on a ballot for a vote. In that time, 58 referendum petitions were filed, and 21 went directly to the legislature under the constitutional provision authorizing referendums to go to the legislature; 8 of the remaining 37 were validated and placed on the ballot for a vote.[1] Since 1972, the petitions submitted to the State have been public records, available for public review. Petitioners have pointed to no incident of harassment or harm to any petition-signer over the four decades since the Public Records Act became law, and we are aware of none.

### 2. The Washington State Supreme Court and this Court Consistently Characterize the Power of Initiative and Referendum as Legislative Power

Washington's Supreme Court has recognized that the power of initiative and referendum are legislative

[1] Washington State Secretary of State, "Elections & Voting, Index to Initiative and Referendum History and Statistics: 1914-2009," *available at* www.sos.wa.gov/elections/initiatives/statistics.aspx, last visited March 24, 2010.

powers, exercised directly by the people. *State ex rel. Mullen v. Howell*, 181 P. 920 (Wash. 1919); *Fritz v. Gorton*, 517 P.2d 911 (Wash. 1974). This Court, likewise, has described the power as legislative in nature. *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976).

In *State ex rel. Mullen v. Howell*, a case regarding Washington's adoption of the Eighteenth Amendment to the United States Constitution, Washington's Supreme Court determined that, "[u]nder the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of the state." 181 P. at 926. Judge Mackintosh, in his concurring opinion, was even more explicit, stating that "[b]y the adoption of the initiative and referendum amendments the people of this state became a part of the legislative branch of the state government." *Id*., at 928.

In *Fritz v. Gorton*, various persons, including a professional lobbyist, challenged the constitutionality of Initiative 276, the statewide, citizen-sponsored initiative that became the Public Records Act. After reciting its history, *Fritz* characterized Washington's referendum process as a vehicle for "direct legislation." 517 P.2d at 916. Initiative 276 survived the thorough examination it received in *Fritz*, and has stood on solid constitutional ground since its passage in 1972.

This Court affirmed the direct legislative action embodied in the referendum: "The referendum . . . is a means for direct political participation, allowing the

people the final decision, amounting to a veto power, over enactments of representative bodies." *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 673 (1976). The Court also quoted an opinion from the Ninth Circuit that referred to the referendum process as an act of "direct legislation." *Id.*, at 678, quoting *Southern Alameda Spanish Speaking Organization v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) (declaring that the referendum is "an exercise by the voters of their traditional right through direct legislation to override the view of their elected representatives as to what serves the public interest.") Here, as in *Eastlake*, *Mullen* and *Fritz*, the Petitioners have exercised the referendum process as a direct legislative action.

### 3. A Citizen Who Affixes Her Signature to an Initiative or Referendum Petition Engages in a Significant Legislative Act, Not Merely Speech

A petition for an initiative or referendum is not an argumentative or hortatory item. It is a specific directive to the Secretary of State, commanding the Secretary of State to put a specified measure on the ballot.

Amendment 7 to the Washington constitution authorized the state legislature to make laws effectuating the right of direct popular legislation. In 1913 the legislature provided that petitions for referenda must contain the following language above the signature lines:

> To the Honorable . . . . . , Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No . . . . . , filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the . . . legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the . . . day of November, (year) and each of us for himself or herself says: I have personally signed this petition, I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

WASH. REV. CODE § 29A.72.130 (2005).[2]

The execution of a referendum petition is more than mere expressive conduct or the advocacy of a particular political viewpoint. It is an act of legislation. Persons circulating a pamphlet or signing a petition for submission to members of a representative governmental body asking that particular action be taken are expressing viewpoints on an issue. Their

[2] Substantially identical language is required for initiative petitions, under the same code provision. WASH. REV. CODE § 29A.72.130 (2005).

action is advocacy, aimed at persuading voters or representatives to act in accordance with their views. But they have no authority to require that the action requested be taken. In contrast, persons executing a referendum petition, by virtue of the Washington State Constitution, are exercising legislative power. They are not urging others to take discretionary action on their behalf. They are directing the Secretary of State to place a measure before the voters of the State for a vote. The Secretary of State's review of the petitions is limited to a determination whether there are sufficient Washington voters listed on the petitions so that the ballot measure may go forward.

This action of referring a matter to the voters is precisely comparable to the action of state legislators to refer a particular proposed bill to the full legislature for approval. While legislators, in taking such action, might be subject to criticism from citizens who disagree with the legislators' viewpoint on a proposed bill, it has never been suggested that the First Amendment mandates that the legislators should be cloaked in anonymity in voting on whether to refer a bill to the full legislature, to avoid being criticized or intimidated.

As the Court of Appeals correctly recognized in this case, a citizen signing a referendum petition is not engaged in pure advocacy or simply expressive conduct; signing the petition is an act of legislation. It is the first and essential step in the legislative process by which measures proposed by citizen legislators are submitted to the popular vote.

Sponsors[3] of legislation are free to advocate for or against the legislation they have sponsored, but they cannot deny that in sponsoring legislation they have put their hands on the levers of state power, and have directly begun the process of making law, in a way that mere advocates of political positions (anonymous or otherwise) do not.

The Court of Appeals correctly recognized that acts accomplished by speech (or similar communication media) are different from speech that is pure speech. It is commonplace in our law, for example, that conspirators can be prosecuted for the act of conspiracy, even though that act can only be accomplished by speech. *Dennis v. United States*, 341 U.S. 494, 575-76 (1951); *Giboney v. Empire Storage & Ice,* 336 U.S. 490 (1948). The case of *United States v. O'Brien*, 391 U.S. 367 (1968), which the Court of Appeals cited for the same principle, even more emphatically supports the Court of Appeals' judgment in this case. Burning a draft card is far more clearly expressive conduct than the act of initiating legislation by signing a referendum petition, but this Court did not hesitate in that case to affirm that legislation intended to deal with the *conduct* associated with draft card burning was not prohibited by Constitutional principles that protect speech.

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[3] Certain amici have argued that persons proposing legislation for the popular vote may not actually support the measures which they are proposing for inclusion on the ballot. Even if true, unlikely as that may seem, these persons are nevertheless "sponsors" under state law. WASH. REV. CODE § 29A.72.020 (2005).

### B. There Is No Right, Fundamental Or Otherwise, To Operate The State Process For Direct Popular Legislation In Secret

#### 1. Direct Legislation Is Not Provided for or Protected in the United States Constitution

##### a. The Constitution provides for purely representative democracy, and contains no provision for direct legislation.

The United States Constitution originally provided for popular involvement in the federal government only through a purely indirect, representative process. The people were entitled to vote directly for representatives to the lower house of Congress. U.S. CONST. art. I, § 2. All other participation in government by the people, as the Constitution was originally drafted, was from at least one remove: representatives to the upper house of Congress, the Senate, were to be selected by state legislatures. U.S. CONST. art. I, § 3.[4] The President was, and is, selected by Electors, not by popular vote. U.S. CONST. art. II, § 1.

[4] The Seventeenth Amendment, ratified in 1913 (in the same period of Populism during which Washington, among other states, amended their Constitutions to provide for the popular power of direct legislation), provided for the popular election of senators.

The Framers of the Constitution did not have unalloyed faith in the abilities of the common citizen: Mr. Gerry of Massachusetts, for example, argued that whereas in England the lack of a popular right to vote threatened the liberty of Englishmen, "[o]ur danger arises from the opposite extreme: hence in Mass. the worst men get into the Legislature. . . . It was necessary on the one hand that the people should appoint one branch of the Govt. in order to inspire them with the necessary confidence. But he wished the election on the other to be so modified as to secure more effectually a just preference of merit." Notes of Debates in the Federal Convention of 1787, Reported By James Madison, 73-74 (Norton Ed., 1987) (1966).

The only method prescribed in the federal Constitution to make statute law is through acts of Congress. There was and is no provision anywhere in the Constitution that endows the people with the ability to propose, or cause the enactment of any statute, at either the federal or state level of government. Though the referendum process is not unique to the State of Washington (there are 25 other states in which adoption of legislation by referendum or initiative is available) the choice whether to permit legislation by direct popular action has been left to the states. The Court has held that the question whether state constitutional provisions enabling direct popular legislation comport with the Constitution's command that states have "a republican form of government" (U.S. CONST. art. IV, § 4) are nonjusticiable political questions for Congress to resolve. *Pacific States*

*Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118, 150 (1912). To our knowledge, Congress has never addressed that question.

### b. The Framers expressly rejected First Amendment protection for the exercise of a direct popular legislative power.

#### (1) A popular right of "instruction" was considered and expressly rejected by the Framers.

When the Framers took up debate over a bill of rights in 1789, "Mr. Tucker of South Carolina then moved to insert these words, 'to instruct their representatives.'" The Complete Bill of Rights: The Drafts, Debates, Sources and Origins, 145 (Neil Cogan, Ed., Oxford University Press) (1997). It was understood that the amendment was intended to vouchsafe to the people a power to dictate to their representatives in Congress how to vote. A number of delegates spoke in opposition, arguing in the main that such a power was fundamentally inimical to the idea of representative government that underlies the Constitution, and "would destroy the very spirit of representation itself, by rendering Congress a passive machine instead of a deliberative body." *Id.*, at 159. Mr. Stone of Maryland protested that "This is a power not to be found in any part of the earth except the Swiss Cantons; there the body of the people vote upon the laws, and give instructions to their delegates. But here we have a different form of government, the people at large are

not authorised under it to vote upon the law, nor did I ever hear that any man required it. Why then are we called upon to propose amendments subversive of the principles of the constitution which were never desired." *Id.*, at 151.

The amendment proposed by Mr. Tucker was voted down "by a great majority." *Id.*, at 160.

### (2) The state-created right of direct legislation is not "petitioning" as provided in the First Amendment.

From the debate on Tucker's unsuccessful amendment, it is clear that the Framers did not conceive that "petitioning" as described in the First Amendment included any power of direct legislation. Indeed, Mr. Gerry of Massachusetts differentiated the First Amendment petitioning right from Mr. Tucker's proposed popular right to "instruct" the members of Congress:

> The amendments already passed had declared that the press should be free, and that the people should have the freedom of speech and petitioning: therefore the people might speak to their representatives, might address them through the medium of the press, or by petition to the whole body. They might freely express their wills by these several modes. But if it was meant that they had any obligatory force, the principle was certainly false.

*Id.*, at 159.

Petitioners here cannot be heard to contend that the power afforded to them under Washington's constitution to sponsor legislation directly without going through the representative process is within the scope of the First Amendment; not when the Framers themselves so clearly and directly declared that it was not.[5]

"Petitioning" then, as described (and actually protected) by the First Amendment must be understood to mean only that citizens have a right to advocate to the people generally and to address their representatives that cannot be abridged by government, and not that citizens have any right to legislate directly. Viewed in that light, the First Amendment not only does not sustain Petitioners' application to this Court to create a right to legislate in secret, it is actually at odds with it. In states like Washington that have a right of direct popular legislation, the language and purpose of the First Amendment would logically serve to protect Washingtonians' right of access to one another for purposes of persuasion, not to insulate citizen-legislators who seek to make new laws from the views and wishes of their fellow citizens.

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[5] WCOG acknowledges that Washington, having decided to extend the right of direct legislation to its people, may not violate other provisions of the federal Constitution in its administration and implementation of that right and may not limit the people's freedom to speak about the exercise of the right. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). It does not – *see* Section E-4, *infra.*

### 2. There Is No Federal Constitutional Right to Legislate in Secret

#### a. The United States Constitution affirmatively provides for transparency and accountability in the legislative process.

The federal Constitution does not provide for or protect a power of direct popular legislation. In addition, it does not provide for or protect any power to legislate in secret.[6] On the contrary, it requires public

[6] Petitioners argue somewhat loosely that they seek to establish a right to exercise their state constitutional right to direct popular legislation "anonymously." However, that is not quite what Petitioners are really asking for. Petitioners do not challenge the constitutionality of WASH. REV. CODE § 29A.72.130, 150 (2005), which require that direct popular legislation can be accomplished only by the submission of signed petitions, that only eligible voters may sign the referendum petitions, and that the signatures on the petitions must be validated by the Secretary of State. Petitioners appear to concede that, as this Court has recognized, "there must be a substantial regulation of elections if we are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974), and that the Secretary of State must be able to validate that signers of initiative and referendum petitions are eligible voters ("chaos" would certainly result if any person – citizens of other states or even Canada, which borders Washington State – could sign a referendum petition). In those circumstances, Petitioners aren't seeking "anonymity" at all, in the sense of *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995), where petitioner resisted disclosure *to the government* of her identity as a pamphleteer. Rather (in an unusual twist in First Amendment cases, which generally involve an assertion of liberty from restraint by formal government agencies) Petitioners are

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proceedings. The general rule is that the public's business be conducted in a public manner, except when the national interest demands secrecy. "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . " Significantly, a minority of either House may *require* that "the Yeas and Nays of the Members . . . be entered on the Journal." In other words, there is little likelihood that the identities of the voters on bills will be withheld from the public. U.S. CONST. art. I, § 5. This Court has interpreted that clause to mean that the Framers intended the public business to be conducted in public, as a means of ensuring the accountability of legislators to the public. *Field v. Clark*, 143 U.S. 649, 670 (1892).

**b. The United States Constitution did not require secrecy in voting.**

**(1) Like the power of direct legislation, the secret ballot is a creation of state law.**

Contrary to the arguments of Petitioners and amici, who discover in the federal Constitution a supervening "fundamental right" of anonymity in the legislative process, the federal Constitution does not provide for any secrecy even in the electoral process.

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seeking to make laws in *secret*, divulging their identities to government officials, but hiding them from their fellow citizens.

Though the "Australian" system of secret ballots is by now well-ensconced in American political life, secret ballots were not required by the Constitution. At the time of the American Revolution "many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some." *Burson v. Freeman*, 504 U.S. 191, 200 (1992). Secret ballots did not come into use until the states severally decided to use them (at different times), in the exercise of their "broad power" to manage their electoral processes. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). But the Constitution does not command secrecy at the polling place, and this Court has never declared such a requirement to be implicit in any provision of the Constitution. The Court has recognized Congress' power to protect the franchise by adopting measures to reduce the possibility of intimidation, but did not say Congress was Constitutionally compelled to adopt them. *The Ku-Klux Cases*, 110 U.S. 651 (1884).

**(2) Washington's constitution does provide for a secret ballot, but not for secret initiation of direct popular legislation.**

The drafters of Washington's constitution included an express provision for a secret ballot. Article VI, § 6 of Washington's constitution provides:

> All elections shall be by ballot. The legislature shall provide for a method of voting as will ensure to every elector absolute secrecy in preparing and depositing his ballot.

The people of Washington – and their leadership who drafted their constitution – plainly understood how to provide for secrecy when, in their judgment, it was important to the democratic process to provide for it. They pointedly did *not* provide for secrecy in the popular direct legislative process; on the contrary the 1912 amendments to Article 2, Section 1 expressly required sponsors of direct legislation to do so by signing petitions to be filed with the Secretary of State. It is true that the Attorney General of Washington opined much later that such petitions were not public records, but that position was overturned by the act of the people in adopting the Public Records Act.[7] Initiative and referendum petitions have been public records since 1972. Thus, amici's argument that a right to legislate in secret should be implied from Washington's constitution is incorrect.

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[7] Both in this Court and below, Petitioners have misunderstood the operation of the Public Records Act. The Act does not specifically detail what records are and are not public. Instead, it ordains that *all* records in government hands are public, unless specifically exempted from disclosure by law. WASH. REV. CODE § 42.56.070(1) (2006). There is no exemption in Washington law for initiative and referendum petitions.

### c. The Court has held the Federal Constitutional right to petition the Congress is properly subject to transparency rules.

Not only does the Constitution generally require transparency in the legislative process, this Court has upheld laws adopted by Congress to enhance that transparency against challenges that requiring lobbyists to make disclosures would violate their rights to petition under the First Amendment.

In *United States v. Harriss*, 347 U.S. 612 (1954), the respondents had been convicted of failing to register and make required disclosures as lobbyists, under the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270. They challenged the statute, claiming that it infringed their rights of speech and to petition under the First Amendment. The Court rejected that contention.

The Court observed that the statute might be a deterrent to citizens unwilling to comply, but said this incidental effect did not demand a different outcome. The Court noted that the claims, as in this case were largely hypothetical,[8] but said "even assuming some such deterrent effect, the restraint is at most an

[8] The fact is that Petitioners in this case were *not* deterred from signing their referendum petition, even though at the time they signed their petition such petitions were known to be public records under the Public Records Act.

indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from the criminal libel laws. The hazard of such a restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power . . . " *Id*., at 626.

The Washington State Supreme Court relied on *Harriss* in its review of Washington's more stringent disclosure requirements for lobbyists, which were adopted as part of the same initiative in which the people of Washington adopted the Public Records Act. Citing *Harriss*, the Court held that the right to petition was not offended by disclosure requirements. *Fritz*, *supra*.[9]

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[9] The Washington Court doubted that the right to petition was a right to petition *secretly*:

> Since its ancestral beginnings as an obscure provision in the Magna Carta, the right to petition has been commonly understood to be a procedure of an open and public nature. The history of England includes picturesque exercises of this right including a Chartist petition in 1842 six miles in length which had to be broken into bundles before it could be presented to the House of Commons. The right to petition was incorporated into many of the legislative pronouncements of the rebelling colonies and in the Declaration of Independence. In the 1830's, the Congress was deluged with petitions calling for the abolition of slavery. In response, the House adopted a standing rule that all petitions of this nature would be tabled without public notice, or action of any kind. John Quincy Adams vehemently fought and won repeal of the rule maintaining that not even 'the most

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### C. Petitioners Identify No Case Law Establishing A Right To Secretly Sponsor Legislation

The three primary cases relied on by Petitioners, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *Meyer v. Grant*, 46 U.S. 414 (1988), do not establish a right to engage the legislative process in secret. These cases all involve interactive speech activity surrounding the election process at the state level but none involves the actual act of legislating as invoked by Petitioners herein.

#### 1. *Buckley v. American Constitutional Law Foundation, Inc.* Is Inapplicable Here

In *Buckley*, the court struck down Colorado statutes that required that initiative petition circulators be registered Colorado voters and wear

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abject despotism' would 'deprive the citizen of the right to supplicate for a boon, or to pray for mercy.' Other notable examples of open and well publicized petitioning in the history of the United States include: the deployment of unemployed armies of petitioners by General Coxey of Ohio in 1894, the march for bonuses by veterans in 1932, and the dramatic marches of the poor led by Dr. King and Reverend Abernathy in the past decade. We note these examples to emphasize the intrinsically non-secretive and public nature of the historic development of the right to petition. *Fritz*, 517 P.2d at 929.

identification badges, and that reports be made to the state containing names, addresses and amounts distributed to all paid circulators. The Court was concerned that such state requirements unconstitutionally infringed upon "interactive communication concerning political change." *Buckley*, 525 U.S. at 186, quoting *Meyer*, 486 U.S. at 422. The Court also determined that the Colorado laws "significantly inhibit[ed] communication with voters about proposed political change." *Id*., at 192.

Unlike the offensive provisions in *Buckley*, Washington's Public Records Act in no way trenches upon the interactive, one-on-one communications that a petition-gatherer seeks. There is no limiting of the political message, no threat that the freedom to engage in political discourse and "the expression of a desire for political change" will be foreclosed. *Id*., at 199. And, unlike the badge identification requirement declared unconstitutional in *Buckley*, any disclosure of the Washington petition-signers' identities after the petitions have been submitted to the Secretary of State does not compel disclosure of those persons' identities "at the time they deliver their political message." *Id*., at 209. That is, the interactive communication can still take place, and the petitions may still be referred to the ballot, without the petition-signers' facing harassment or repercussions at the time they are engaged in speech. *Buckley* does not create a constitutionally protected right to direct legislation, anonymous or otherwise.

### 2. *McIntyre v. Ohio* Is Inapplicable Here

#### a. *McIntyre* applies solely to the right of pure advocacy and not to the legislative process.

In *McIntyre*, the court declared that an Ohio statute requiring the name of a person authoring an election pamphlet violated the First Amendment. As the Court made clear, the question in *McIntyre* concerned the "distribution of anonymous campaign literature." *McIntyre*, 514 U.S. at 336. *McIntyre* involved a single person who created and distributed handbills in opposition to a proposed school tax levy in front of an Ohio middle school. Ms. McIntyre was not proposing legislation for a vote of the people of Ohio; rather, she was simply expressing her opinion as to the proposed referendum. Ms. McIntyre was engaged in pure advocacy, as opposed to sponsorship of legislation.

#### b. The Court has often recognized distinction between pure speech and action accomplished by speech.

This Court has previously recognized a distinction between pure speech and action accomplished by speech. *See O'Brien*, *supra* (recognizing the existence of "speech" and "non speech" elements in the act of burning a Vietnam War draft card); *Dennis*, *supra* (Communist conspiracy not protected by free speech allegations); *Giboney*, *supra* (restraint on labor union picketing activities did not violate picketers' First Amendment rights). In *Dennis*, the Defendants were

charged with conspiring to form the Communist Party of the United States to advocate for the overthrow of the United States Government by means of force and violence. *Dennis*, *supra*, at 497. The *Dennis* Court recognized that freedom of speech was often raised in conspiracy cases, because "communication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved." (Jackson, J., concurring, *id*., at 575). However, as stated in *Giboney*, and quoted by *Dennis*, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Giboney*, *supra*, at 502.

Here, the petition-signers' act of signing a petition to be presented to the Secretary of State and placed on the Washington ballot is clearly distinguishable from the leafleting and handbilling undertaken by Ms. McIntryre in Ohio. The Ninth Circuit correctly differentiated the initiation of legislation from pure advocacy. *Doe v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009) ("The district court's analysis was based on the faulty premise that the [Public Records Act] regulates anonymous political speech.") Although the Ninth Circuit accepted for purposes of its review that the signing of the petition was "speech," it clearly differentiated the speech involved in petition-signing from that of leafleting, handbilling or actual petition-gathering, all forms of pure political speech subject to review under strict scrutiny. There is no

constitutional protection for direct legislative action as undertaken by the petition-signers herein.

### 3. *Meyer v. Grant* Is Inapplicable Here

#### a. The Court carefully circumscribed Meyer's application to circulation and solicitation of petitions.

*Meyer* is a free speech case which addressed specifically the circulation of petitions, the solicitation of signatures, and a Colorado statute that made it a felony to pay petition circulators. The Court found the law unconstitutional because petition circulation "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421-22 (internal citation omitted). No such core political speech is implicated in this case. The Court's holding was carefully circumscribed throughout the opinion to apply only to "circulation" of petitions or "solicitation" of signatures. Nowhere did the Court go so far as to rule that the act of signing constituted the kind of speech that the Constitution requires to be anonymous (obviously, in signing her name in compliance with state law, a citizen necessarily yields her anonymity).

#### b. Washington has not limited Petitioners' rights to core political speech.

Unlike in *Meyer*, there is no allegation and no proof that Washington has limited the Petitioners' right to circulate and solicit signatures. There is no

allegation and no proof that Washington has limited the Petitioners' right to speak anonymously in favor or opposition to any proposition. Washington has no law constraining Petitioners' access to their elected representatives (either anonymously or otherwise). There is in fact no allegation or proof of any limitation on core political speech; that is, the interactive, one-on-one communications referenced by this Court in *Meyer* (*id*., at 424) and *Buckley* (O'Connor, J., concurring, 525 U.S. at 215). *Meyer's* rationale is inapplicable to the Petitioners' claim because no one has limited or obstructed Petitioners' rights to circulate, solicit and advocate for signatures and passage of a particular referendum. These values of core political speech and advocacy have been respected. Washington's constitution does require that a person wishing directly to operate the levers of government must identify himself; Washington's Public Records Act provides that the identity of petitioners is a public record.

#### 4. The Petitioners' Legislative Actions Differentiate Their Situation from the Issues Facing the Court in *Buckley*, *McIntyre* and *Meyer*

None of the Petitioners' three principal cases holds that the act of executing a referendum petition, pursuant to which a citizen is exercising legislative powers, is an interactive communication subject to review under a strict scrutiny standard. In fact, the Court carefully circumscribed its holding, in *Meyer* in particular, to address only the "circulation" of election

materials. While signing a referendum petition is definitely a communication related to the legislative process, its *purpose* is not pure advocacy, it is to require the Secretary of State to take an essential step toward making law.

Once a referendum measure is validated by the Washington Secretary of State, who determines whether an appropriate number of voters have signed referendum petitions, the matter is submitted to the people of the State of Washington for a vote. The vote by the people certainly constitutes an election subject to the secret ballot requirement of the state constitution. But signing a petition directing that a matter be placed on the ballot is not an election.

In the case at bar, there is no challenge to the State requirement that a petition must be signed in order that the State can determine whether the proper number of eligible voters in the State have exercised legislative power to demand a particular measure be submitted to voters for approval. It is understood that the execution of the petition occurs after the interactive communication has taken place. In other words, the petition gatherers have been able to approach individuals and request that they sign the particular referendum petition in question. In contrast, the act of signing the petition is a directive to the State by the citizen legislators executing the petition that a measure be placed before the voters for approval. The execution of a petition does not seek a response from any other person to that act other than the State's validation of the signature.

None of the interactive communication that was the subject of *Buckley*, *McIntyre* or *Meyer* is at issue in the case at bar. This case does not involve limitations on the solicitation of signatures. Nor does it involve any reporting requirements as to petition circulators, nor requiring them to wear badges. This case does not involve restrictions on the ability of petition circulators to circulate pamphlets that have been drafted by anonymous authors. While circulating petitions and pamphlets, and solicitation of signatures is advocacy, the acts of signing and filing the petition are legislative acts. The distinction matters.[10]

### D. Transparency, Like Direct Legislative Power, Is A Core Political Value In Washington

#### 1. Washington's Constitution, Like the Federal Constitution, Requires Open Government

Article 2, Section 11 of the Washington constitution mimics the requirement of the federal Constitution

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[10] This is not a case of pure speech. But even if it were the kind of pure speech as to which the Court has said the Constitution provides a right to speak anonymously, as in cases like *McIntyre*, the Court has still never said that the right of anonymous speech is required in every context. The Court has not held, in other words, that in all cases where any person advocates any position on a political or governmental issue, that person must be accorded anonymity. If it were otherwise, it is hard to understand how every individual who came before a city council to testify on a controversial issue might not wear a hood, and why every mayor and congressman might not be privileged to act behind closed curtains, fully in keeping with our Constitution.

that the acts of the legislature be done in public and recorded in public journals. The constitution requires, quaintly perhaps (but in service of a clear desire by the people of Washington to have access to the goings-on of their legislature) that the "doors of each house shall be kept open" when the legislature is in session, subject to a power in the legislature to debate in secret where the public welfare requires it. WASH. CONST. art. II, § 11. Even after a secret debate, however, there must be a public rendition of the voting record:

> No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same shall be entered on the journal of each house . . .

WASH. CONST. art. II, § 22.

**2. Numerous Washington Statutes Adopted by Direct Legislation Underscore Importance Washingtonians Put on Transparency in Government**

**a. The Public Records Act was adopted by initiative in 1972.**

One of the most significant exercises of citizen legislative power in Washington's history occurred in 1972 when a coalition of citizens groups placed before the voters of the State Initiative 276, which provided for public disclosure requirements as to campaign financing and lobbying, and which also mandated

that public records in Washington be open for public review. The initiative was passed in response to the public's concern as to lack of governmental accountability and what was perceived as misuse of government power during the civil rights and Vietnam War era.

The preamble to the Act sets forth deeply held principles of democratic government thoroughly in keeping with the spirit that animated the Founders in the first place:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and the exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

WASH. REV. CODE § 42.56.030 (2006).

In its 38 years of existence, the Act has never been amended to exempt from public disclosure referendum and initiative petitions, and it is conceded in this case that the Public Records Act mandates disclosure of the petitions. No portion of the Public Records Act has ever been declared unconstitutional under either the federal or state Constitutions, with

the exception of the District Court ruling in this matter.

**b. The Washington Public Disclosure Act was adopted by the same initiative in 1972.**

In the same initiative in which they adopted the Public Records Act, Washingtonians adopted broad disclosure requirements for lobbyists. The state Supreme Court upheld these requirements against Constitutional challenge in *Fritz v. Gorton*, *supra*. In that statute, it was

> declared by the sovereign people to be the public policy of the State of Washington . . . that full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

WASH. REV. CODE § 42.17.010(11) (2006).

**c. Open Public Meetings Act – adopted by Washington's legislature in 1972.**

In the same era, animated by the same sense of need to increase the transparency of governmental operations and thus to enhance citizen oversight, the state legislature enacted the Open Public Meetings Act, WASH. REV. CODE Ch. 42.30, *et seq*. In it, the legislature declared that:

> All public commissions, boards, councils, committees, subcommittees, departments,

> divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. WASH. REV. CODE § 42.30.010 (2006).

Under the Act, decisions by state and local agencies and boards are required to be taken in open meetings. Actions taken behind closed doors are "null and void," WASH. REV. CODE § 42.30.060(1) (2006), and have no force or effect, except in narrowly prescribed circumstances allowing for discussion in executive sessions. WASH. REV. CODE § 42.30.110 (2006).

### E. The Drafters Of Washington's Constitution Were Free To Balance The Unique State Interest In Transparency And The State-Created Right Of Direct Popular Legislation As They Did

#### 1. The Constitution Affords States Entitlement to Govern Their Own Electoral Processes

This Court has recognized that each individual state "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco City Democratic Central Committee*, 489 U.S. 214, 231 (1989). This court in *Burson v. Freeman*, 504 U.S. 191 (1992), outlined the evolution of the election process throughout the states and emphasized that the individual states have each been

allowed to develop their own process – including implementation of the secret ballot – some states acting more quickly on voter fraud and intimidation issues than others. Federal intervention in this evolution has been rare.

### 2. States Have the Right to Balance Competing Interests So Long as They Do Not Violate an Express Constitutional Command

*Burson*, involved a statute that created a zone around the polling place within which advocates could not confront and seek to persuade voters. The clear effect of the statute was to limit free speech of the most basic kind – speech designed to persuade fellow citizens on matters of political import – but the state defended it on the ground that the limitation on free speech was justified by the reduction of possible intimidation or improper influence on voters. Significantly, the *Burson* Court did *not* declare that the Constitution contained any requirement that voters be absolutely free of influence. Nor did the Court say that the Constitution required that the state balance the two desiderata – free speech and intimidation-free voting – in any particular way. The Court did hold that the state was free to limit free speech rights in pursuit of a desirable reduction of the possibility of improper interference with voter choice and discretion, and the Court approved the state's choice without drawing a specific line as to how the balance

should be achieved.[11] In this case, likewise, the people of Washington were free to decide for themselves how to balance the goals of transparency in government and of liberal access by citizens to the power of direct popular legislation. They have done so in a way that does not violate any affirmative Constitutional limit; as in *Burson*, their choice should be respected.

### 3. Washington Respects the Right to Speak Anonymously, and Its Constitution Establishes a Right to Vote in Secret, but It Requires the Legislative Process to be a Matter of Record

The federal Constitution protects the right of citizens of all states to engage in core political speech anonymously, if they wish to do so. *See McIntyre*, *supra*. Washington has no laws that trench upon that Constitutional privilege, and Washington has taken no step that interferes with any anonymous advocacy the Petitioners here may wish to undertake in pursuit of their legislative goals. And, as we have shown, Washington's constitution affords all voters a right to exercise their franchise in "absolute secrecy." Petitioners do not complain that their right to a secret ballot was in any way affected in this case. However, Washington law is specific; if citizens wish to do

[11] In an analogous decision, the Court affirmed Congressional power to balance free speech rights against proper and efficient operation of the federal government, noting that exact choices how to do so were for Congress to make. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947).

more than advocate and vote, if they wish to move the levers of state power by actually sponsoring legislation, they must identify themselves. We show below that several healthy policies are served by that choice, though it is WCOG's respectful submission that the people's desire for transparency is a reason sufficient unto itself that need not be supported by further justifications. Petitioners have not explained why citizen legislators should be permitted a privilege of secrecy not afforded to other political and governmental actors who similarly exercise constitutional power to affect the laws governing the people, like candidates for office, officers of executive agencies, judges, legislators, and so on.

#### 4. Petitioners Do Not Contend that Any Other Potentially Applicable Provisions of the Federal Constitution Are Violated

It is well-established that even though Washington is not required to extend its citizens the power of direct popular legislation, once it has done so it cannot administer that power in a way that offends the federal Constitution. The power of initiative and referendum is not, as we have shown, within the First Amendment. Petitioners have not argued that Washington's constitutional provisions for the exercise of the power of initiative and referendum offend any other provisions of the federal constitution either. Indeed, they do not. The constitutional provisions requiring signatures, and the Public Records Act that makes such signatures public records, are content-neutral and equally applicable to all citizens

regardless of gender, color, creed, class, belief system or political persuasion.

Petitioners attack a general public records statute requiring that, in the absence of a specific exemption, public records in the State must be available for public review and inspection. WASH. REV. CODE § 42.56.070(1) (2006). The Public Records Act, as it applies to referendum petitions, is not over-inclusive or under-inclusive, that certain documents are subject to public disclosure when only a limited type of record should be covered.

There is no dispute that the Public Records Act is content-neutral. It contains no requirement, for instance, that only certain types of referendum petitions or initiative petitions be made available for public inspection. All such petitions are to be made available. Nor is there any argument that the Public Records Act discriminates or impedes the ability of any minority or historically persecuted group to speak freely. Rather, the Public Records Act is a content-neutral, nondiscriminatory statute that deals with all public records, one category of which are referendum and initiative petitions.

The state constitution and the Public Records Act do not compel speech. No citizen is required to sponsor legislation, or to sponsor (or not sponsor) legislation of any given type. The law simply requires that citizens identify themselves if they do sponsor legislation, just as the law would require them to identify themselves if they were to run for public office.

**5. The Public Records Act Serves Many Important Public Interests**

**a. Washington's goal of governmental accountability is served by the Public Records Act.**

The Public Records Act serves an important governmental purpose – holding government officials accountable for performance of their official duties by making sure that Washington citizens are fully informed about matters of public concern, such as referendum and initiative petitions.

Washington courts have repeatedly recognized that the Public Records Act gives full effect to strong state policy making government accountable to the people:

> The stated purpose of the Public Records Act is nothing less than a preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people risks becoming government of the people, by the bureaucrats, for the special interests.

*Progressive Animal Welfare Soc'y v. Univ. of Wa.*, 884 P.2d 592, 597 (Wash. 1994).

In the same opinion, the Washington Supreme Court referenced the potential devastating impact of lack of information:

> In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."

*Id*.

The making of statute law is a highly important function of a democracy. Referendum and initiative, in Washington, are constitutionally-sanctioned law making powers. Making referendum petitions available for public review promotes sovereignty of the people and accountability of government officials and institutions in at least three different ways.

### b. Public availability of petitions allows for oversight of validation process.

Only Washington voters can sign the referendum petitions and the information in the petitions must include printing of the signer's name, address, town or city, and county of residence. WASH. REV. CODE § 29A.72.130, 150 (2005). Once the petitions are submitted to the Secretary of State, State officials must validate whether the signers are, in fact, voters in the State of Washington. If a citizen disagrees with the State officials' validation determination, any citizen can bring a lawsuit challenging the State's validation of signatures. WASH. REV. CODE § 29A.72.240 (2005). However, oversight of the government officials' actions is denied if citizens are not given the opportunity to review the signatures that have been submitted. If

petitions cannot be publicly disclosed, there is no mechanism for oversight. Denying citizens the right to view the petitions to determine whether a court challenge should be brought guts the statutory right all Washingtonians have to challenge initiative and referendum proceedings and renders impossible citizen oversight of the validation process, undercutting the concept of accountability.

### c. Making petitions publicly available promotes citizens being fully informed.

Secondly, having the petitions available for public review allows citizens to be fully informed as to how they may choose to vote on a particular measure. Many times, voters' decisions on how to vote on a ballot measure are determined by who the supporters of the ballot measure are. Have the referendum petitions been signed only by the supporters of a particular special interest group? Are the signers of the petitions all located in a specific geographic area or do the petitions suggest broad-based support for the ballot measure throughout the State? Have the petitions been signed by elected leaders? By influential private citizens? If petitions are not made available for public review, answers to these questions cannot be provided and citizen voters will be deprived of full information concerning a decision to support or oppose a ballot measure.

**d. Public availability of petitions lessens promotion of frivolous referendum measures.**

Third, the concept of accountability also applies to citizens who, in exercising state constitutional power to act as legislators, are accountable to their fellow citizens in directing that legislation be placed on the ballot. If anonymity is accorded to petitioners, citizens exercising their constitutional authority as legislators can escape accountability to their fellow citizens – the result very possibly being that frivolous measures will be placed before the voters for consideration, or that the same individuals time and again will be the sole sponsors behind proposed legislation.

**e. Public availability of petitions fosters public discussions of topics of public interest.**

Public discussion is a healthy aspect of democracy. *See Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (discussing the beliefs of "those who won our independence"), *overruled in part* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). "Discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Id*., at 375.

This Court has recognized that there is a right of the public to receive information. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

> The Constitution protects the right to receive information and ideas. "This freedom (of speech and press) necessarily protects the right to receive." [citations omitted] This right to receive information and ideas, regardless of their social worth, [citation omitted] is fundamental to our free society.

*Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

The Washington Supreme Court, in analyzing a constitutional challenge to the lobbyists' disclosure requirements of Initiative 276 – the same initiative in which the Public Records Act was adopted – noted that it accepted "as self-evident the suggestion . . . that the right to receive information is the fundamental counterpart of the right of free speech." *Fritz, supra*, at 924. The court stated that the "right of the electorate to know more certainly is no less fundamental than the right of privacy." *Id*., at 925. In rejecting the constitutional challenge to Initiative 276, the Supreme Court stated that,

> Initiative 276, as we have noted, was created by the people for the express purpose of fostering openness in their government. To effectuate this goal, it is important that disclosure be made of the interests that seek

> to influence governmental decision making. . . . the electorate, we believe, has a right to know of the sources and magnitude of financial and persuasive influences upon government.

*Id*., at 931.

Petitioners fail to credit the significant interest by the people in the State of Washington in knowing who among their fellow citizens are exercising the legislative power reserved to them under the State Constitution. Petitioners give short shrift to the fundamental principle, as espoused by this Court and as evidenced in the Public Records Act, that the public ought to be able to receive important information about the conduct of government – in this case the exercise by fellow citizens of legislative power under the Washington constitution.

### f. The "uncomfortable conversations" Petitioners seek to avoid are healthy debate.

Washingtonians have a right to engage the sponsors of direct legislation in debate. Citizens sponsoring legislation should be available to be petitioned by fellow citizens having views on the subject. Below, Petitioners relied primarily on claims of harassment from other states involving other legislative efforts. As for Washington, Petitioners focused on a statement from the co-director of KnowThyNeighbor.org that that his group hoped to engage Petitioners and other

opponents of the legislation Petitioners sought to submit to referendum in dialogue that might be "uncomfortable for both parties."[12] Petitioners object to such "uncomfortable" conversations and seek to insulate themselves from having to comment on and perhaps defend their decision to set the legislative process in motion. This Court has long recognized the importance of open and free political debate, and the sometimes heated exchanges that come with it:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental

[12] The Petitioners take this "uncomfortable conversation" language from a Press Release and Statement and Statement from KnowThyNeighbor.org's co-director, Aaron Toleos. (9th Circuit Excerpts of Record, 105). The full quote is, "[T]hese conversations can be uncomfortable for both parties, but they are desperately needed to break down stereotypes and to help both sides realize how much they actually have in common." *Id*. Thus, the Referendum 71 opponents appeared to seek dialogue to bring the parties together rather than instigating divisive confrontations.

> principle of our constitutional system.' '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' 'The First Amendment, said Judge Learned Hand, presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'

*New York Times Co. v. Sullivan,* 376 U.S. 254, 269-270 (1964) (internal citations omitted).

This Court has stressed that "profound national commitment to the principle that debate and public issue should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on those officials or individuals who speak out on behalf of a particular principle. *Id.*, at 270.

If "uncomfortable" conversations turn into unacceptable and illegal conduct, there is redress under state law for limiting such inappropriate conduct.

**g. Anonymous action is not necessarily beneficial.**

The operative truism behind Petitioners' argument is that secrecy emboldens people to do what they otherwise would not do for fear of being

observed. That principle cuts two ways, however: On the one hand, secrecy may embolden citizens to participate more fully in their democracy than they would if they must act openly but in fear of criticism or intimidation. On the other hand (as the examples from other elections in other states furnished by Petitioners and amici demonstrate) secrecy may embolden people to engage in vile, threatening, or illegal speech and actions that they might otherwise avoid out of a sense of shame or fear of detection. Washington's strong public policy in favor of transparent government springs from the idea that public oversight inspires honest, decent behavior.

Washingtonians accept that all people have a Constitutional right to speak freely and anonymously (at some cost to people like Petitioners). And they have provided a state constitutional right to vote in secret on the belief that secrecy at the ballot box best protects the most essential right in a democracy. But they decided that the process of propounding legislation should be a public process; that it is not in their interest as citizens that people should be able to sponsor legislation in secret, for which they can then secretly advocate and on which they can later secretly vote, but rather that sponsors of legislation must declare themselves. That balance was rational, and this Court should "not find that this is an unconstitutional choice." *Burson, supra*, at 210.

**h. Petitioners direct their arguments to the wrong audience.**

If Petitioners believe that Washington has struck the wrong balance between transparency and free exercise of the right to initiate legislation, they are free to try to persuade the people of Washington to change it to a different balance more amenable to Petitioners' views, within the broad range of possibilities the Constitution allows.

## F. Washington Law Does Not Authorize Official Retaliation Against Those Who Exercise Their Right Of Direct Popular Legislation, And Does Not Tolerate Harassment Of Those Who Would Exercise Direct Popular Legislative Power

### Washington Law Forbids the Kind of Harassment of Which Petitioners Complain

Harassment is a crime in Washington. *See* WASH. REV. CODE § 9A.46.010, *et seq*. (2009); WASH. REV. CODE § 9A.46.110 (2009); WASH. REV. CODE § 9.61.230 (2009); WASH. REV. CODE § 9.61.260 (2009). Its legislature has declared that "the prevention of serious, personal harassment is an important government objective. Toward that end, this chapter is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim. The legislature further finds that the protection of such persons from harassment can be accomplished without infringing on constitutionally

protected speech or activity." WASH. REV. CODE § 9A.46.010 (2009).

Harassment of a petition signature gatherer is expressly made a violation of that law. WASH. REV. CODE § 29A.72.110 (2005).

In addition to the laws criminalizing harassment, Washington's code includes a civil remedy. In furtherance of the same purpose declared in the criminal statute, quoted above, Washington's legislature provided a "speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator." WASH. REV. CODE § 10.14.010 (2002). Petitioners have themselves not been harassed or threatened; they have not attempted to avail themselves of remedies available in Washington law.

These and similar laws are deemed sufficient in Washington and every state in the Union to deter threats and harassment of other actors in our public political affairs. Petitioners have not set out any principled basis explaining why citizens who inject themselves into the lawmaking function by direct popular legislation should be anonymous, when other actors in the political process are not. It is incumbent on Petitioners to explain why they, as citizens who inject themselves into the public legislative process, should be immune from amenability to debate or the kind of criticisms typically aimed at public officers, who enjoy no putative Constitutional privilege to make law in secret.

### G. Petitioners Cannot Sustain Their Claim Of Facial Invalidity

Petitioners' lawsuit in Federal District Court is divided into two causes of action. The first cause of action requested a determination that the Public Records Act was unconstitutional on its face in requiring disclosure of any referendum petition. The second cause of action sought a determination that the Public Records Act was unconstitutional, as applied in this case. In issuing the preliminary injunction, the District Court ruled solely on the first cause of action, the facial challenge. The second cause of action, which requires an exploration of the facts relating to the potential impact of disclosure on the signers of petitions, has not been addressed.

Thus, the procedural posture that is presented to this Court is the request by Petitioners that the Public Records Act be declared per se unconstitutional to the extent it requires disclosure of signatures on referendum or initiative petitions, regardless of the nature of the subject matter of the petitions.

As the Court said recently in a decision upholding Washington's primary ballot against Constitutional challenge, "[f]acial challenges are disfavored for several reasons" including that they frustrate the popular will and risk foreclosing statutes based on hypothetical rather than concrete issues. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-451 (2008).

## CONCLUSION

Signing a referendum petition in the State of Washington is the exercise of legislative power under the State Constitution. Signing a petition may thus be distinguished from soliciting signatures on referendum petitions and from restrictions as to who may circulate a petition or what identification they must carry. While such actions have been construed by this Court to constitute core political speech, the act of signing a petition is an essential act of legislation and not a purely hortatory, interactive communication to which the standards concerning core political speech are applicable.

It is true that citizens who seek to lead in a democracy attract the attention of both their supporters and their detractors, and that the latter may abuse their privilege of anonymous speech to make vile comments and even frightening threats. That fact however has never been thought to justify a power in our governmental leadership routinely to operate the machinery of government in secret. The people of Washington have decided that every citizen shall have the power to engage the machinery to make statute law, but that they must do so publicly. Washingtonians had the right to make that decision, balancing their twin desires, in pursuit of self-government as the ultimate sovereign, that direct popular legislation be available and that governmental workings be as transparent as possible. The Founders, who so conspicuously signed the Declaration of Independence at the risk of their very lives,

would not have insisted on the power to override Washingtonians' choice.

RESPECTFULLY SUBMITTED this 25th day of March, 2010.

WITHERSPOON KELLEY

LESLIE R. WEATHERHEAD
*Counsel of Record*
DUANE M. SWINTON
STEVEN J. DIXSON

*Counsel for Washington Coalition for Open Government*